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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-332

IN THE MATTER

OF

83RD REALTY COMPANY,
Debtor-Petitioner,

vs.

JAMAICA SAVINGS BANK,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

IRVING ANOLIK
Attorney for Petitioner
225 Broadway
New York, N. Y. 10007
212 732-3050

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83RD REALTY COMPANY,

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vs.

JAMAICA SAVINGS BANK,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Statement.

The Petitioner, 83rd Realty Company, a partnership which owns certain property in the State of New York, respectfully prays that this Court grant a petition for a writ of certiorari to review the determination of the United States Court of Appeals for the Second Circuit and the United States District Court for the Southern District of New York, both of which Courts declined to reverse an order of the Bankruptcy Court for the Southern District of New York, dismissing a petition in

bankruptcy under Chapter XII of the Bankruptcy Act because Jamaica Savings Bank was a member of the Federal Home Loan Bank (11 U.S.C. §917 [1970]).

Opinion Below.

No opinion was rendered by the United States Court of Appeals, but a brief opinion, which is annexed as an Appendix hereto, was written by the United States District Court for the Southern District of New York, per Charles Metzner, U.S.D.J.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254. The Court of Appeals for the Second Circuit, in essence, affirmed the District Court's determination and the Bankruptcy Court's determination that a Chapter XII proceeding under the Bankruptcy Act would not lie against Jamaica Savings Bank, on the 30th day of May, 1978.

Questions Presented.

1. Whether Chapter XII of the Bankruptcy Act, Section 517 (11 U.S.C. §917 [1970]), precludes relief to a Debtor which owns real estate with respect to a Creditor who is a member of the Federal Home Loan Bank?

2. Whether Section 517 of Chapter XII of the Bankruptcy Act is constitutional?

3. Whether Section 517 (11 U.S.C. 917) of the Act precludes jurisdiction over a member of the "Federal Home Loan Bank of New York" merely because of such membership?

4. Whether Section 517 of the Act was ever intended to frustrate one of the main purposes of Chapter XII by excluding virtually every bank from its operation?

5. Whether Chapter XII, Section 517 applies to commercial loans altogether?

6. Whether the Bank waived jurisdictional claims by participating in the proceedings for over a year before moving to dismiss?

Constitutional and Statutory Provisions Involved.

The Fifth Amendment of the United States Constitution is involved herein, as well as Section 517 of Chapter XII of the Bankruptcy Act.

Background of the Proceedings.

The Bank is the holder of a first mortgage on the Debtor's real property situate at 8331-116th Street, Kew Gardens, Queens, New York. At the time of the appeal, on information and belief, the Bank maintained that there was an unpaid principal balance of approximately $1,600,000 plus unpaid accrued interest of about $180,000. The total being $1,780,000.

In August of 1976, the Debtor filed its petition for arrangement under Chapter XII of the Bankruptcy Act. On August 25, 1976, Judge Lesser signed an order authorizing the Debtor in Possession to operate and manage the business property.

Following the signing of the order of August 25, 1976, there followed a number of meetings and hearings. It was not until on or about August 8, 1977 that the attorneys for the Bank filed a meaningful motion seeking to dismiss the Chapter XII proceeding and permit the Bank to proceed with a foreclosure action.

The Court below, after hearing argument on August 29, 1977, indicated in the minutes of that day, that he was impressed with the Debtor's attorneys' position that Section 517 of the Act was not intended to apply to commercial loans (S.M. 27, 28—8/29/77). The Court, in essence, asserted *"He may be right on that."* The Court continued (S.M. 28):

> "I don't think that I am prepared to make that finding on this record. I think that I am constrained to hold regardless of what I might think about either plan; that the provisions made within that plan insofar as they apply to Jamaica Savings Bank clearly wind up extending or impairing the obligation held by Jamaica Savings Bank, which is apparently secured against this property.
>
> "That being the case, I don't see how I could regardless of what other findings I was to make under 461 or whether anybody has to vote for a plan, whether a debtor can vote or reject a creditor's plan or any of the other things until somebody is prepared to say that 517 doesn't apply to a commercial loan situation . . . ."

The Bankruptcy Court ultimately entered an order on November 23, 1977, dismissing the Chapter XII proceeding so far as the Bank is concerned.

The Bank took the position that the Bankruptcy Court lacked jurisdiction because the Bank was a member of the "Federal Home Loan Bank of New York".

That Court, in essence, agreed with the Bank that it lacked power to allow an "extension or impairment of any secured obligation held by a member of any Federal Home Loan Bank".

Since the proceedings below, the second mortgagee, Curzon & Company, has succeeded in foreclosing upon the property. We believe that this constituted a great injustice upon the Debtor and we are asking this Court to consider the imposition of an order placing the property back where it was prior to the foreclosure.

In essence, what we are asking is that this matter be placed in *status quo ante* to where it was prior to the order of the Bankruptcy Judge dismissing the Chapter XII proceeding.

We point out that the Debtor would be willing to have the bank, or any other managing agent which the bank might choose, manage the property during further court proceedings, if the foreclosure is rescinded.

The Court of Appeals declined to grant a stay, although it docketed the appeal and then dismissed the appeal on the grounds that it felt that there was no purpose to be gained by further oral argument of the case since it obviously agreed with the lower courts. This determination, however, of the U.S. Court of Appeals was "on the merits" and it is from that determination that jurisdiction to apply to this Court stems, since it constitutes an exhaustion of remedies.

Argument on the Law.

Preliminary considerations.

We ask this Court to bear in mind that it is the position of the Petitioner that the "Federal Home Loan Bank" Act, by definition, was never intended to apply to multiple dwelling commercial property, nor to frustrate jurisdiction of the Bankruptcy Court under Chapter XII where a bank is a creditor. It is not disputed that a large number of banks are members of the Federal Home Loan Bank.

Chapter XII arrangements are available only to individuals who own real property or chattels real, which property is put up as security for a debt. Under §401, the provisions of Chapter XII shall apply exclusively to cases under that chapter. Although numerous provisions in other chapters of the Bankruptcy Act are applicable to an arrangement case under Chapter XII, the converse is not true, and the provisions of Chapter XII do not apply to cases under other chapters of the Act. That does not mean, however, that the provisions of Chapter XII apply to a case only while it is being administered under Chapter XII. For example, under certain circumstances an order may be entered in a Chapter XII case directing either that bankruptcy be proceeded with, in which event the case is thereafter administered in substantial effect under the provisions of Chapters I to VII, or dismissing the Chapter XII case without directing bankruptcy. Several sections in Chapter XII become operative for the first time upon the entry of one or the other of those orders. Those sections have no application while the case is being administered under Chapter XII, but do apply if a case once administered under Chapter XII is thereafter administered under Chapters I to VII or if the Chapter XII case is dismissed without bankruptcy being directed. (See Collier on Bankruptcy [Chapter XII, ¶1.01, etc.]).

The Statute Involved.

Chapter XII, §517 (11 U.S.C. 917):

> "Nothing contained in this chapter shall be deemed to affect or apply to the creditors of any debtor under a mortgage insured pursuant to the National Housing Act and Acts amendatory thereof and supplementary thereto; nor shall its provisions be deemed to allow extension or impairment of any secured obligation held by Home Owners' Loan Corporation or by any Federal Home Loan Bank or Member thereof."

POINT I.

The District Court below, which wrote no formal opinion, erred in ruling that Chapter XII had no applicability to the Bank. In essence, the ruling below frustrates the primary purpose of Chapter XII.

At the outset, it must be borne in mind that Section 517 of Chapter XII (sometimes called the "Act") applies in a narrow and proscribed sense to members of the Federal Home Owners Bank, Federal Home Loan Bank.

It is to be noted that the first part of Section 517 of the Act refers to the fact that the provisions thereof shall not apply to secured obligations insured under the National Housing Act, the actual language being that this Chapter shall not be "deemed to *affect or apply*" to the creditors of any debtor under a mortgage insured pursuant to the National Housing Act.

We do not have that situation here. The only possible provision applicable to the case at bar would have to be governed by the second part of that section which deals with the *"extension or impairment"* of any secured obligation held by the Home Owners Loan Corporation or by any Federal Home Loan Bank, or member thereof.

The statute provides that the Act shall not be deemed to allow any such extension or impairment of any such secured obligation.

If interpreted to a dryly logical extreme, it is obvious that Chapter XII would be substantially frustrated since virtually any bank involved in extending credit in connection with a real estate transaction would be a duespaying member of the Federal Home Loan Bank.

It is difficult to conceive that Congress, in enacting Chapter XII Section 517, would have intended to emasculate the effectiveness of the Act in this manner.

The difficulty herein is exacerbated by virtue of the fact that Judge Lesser did not write a formal opinion setting forth his reasons, although he did discuss the matter on the transcript of a hearing on August 29, 1977, *supra.*

A plan or petition for arrangement was filed in August of 1976 by the Debtor and on August 25, 1976 Judge Lesser signed an order authorizing the Debtor in Possession to operate and manage the business and property.

If, for some reason, the plan was not deemed suitable to Judge Lesser, there might be a reason to request a modification, but that would not require a dismissal of the proceeding entirely.

The Bank (first mortgagee) has argued below in effect, that the Bankruptcy Court lacked power to enjoin a foreclosure of the mortgage because the second clause of Section 517 forbade Chapter XII proceedings to "extend or impair" the obligations of mortgages held by members of the Federal Home Loan Bank.

Secondly, the first mortgagee has argued, in effect, that the plan submitted by the Debtor is not suitable.

Dealing with the first argument, we submit that the Bank is wrong in its interpretation of the statute. Section 517 would essentially frustrate the purposes of Chapter XII in many cases, including the instant one, because in most instances the rehabilitation of the Debtor is impossible without continued possession of the mortgaged premises.

We maintain that Section 517 does not deprive the Bankruptcy Court of jurisdiction to enjoin foreclosures of mortgages held by members of the Federal Home Loan Bank, at least in the absence of evidence that the obligations to the mortgagees have been, or will be, impermissibly impaired. (See Collier on Bankruptcy, 14th Ed., 9:14.02, Chapter XII, Article XIV.)

The facts are not in material dispute so far as the loan that was made by the Bank in connection with the property. What is in substantial dispute, however, is the interpretation of Section 517.

One of the main questions herein is whether the secured obligation of the Debtor to the Bank is totally exempt from this proceeding so that the Bank is entitled to immediate possession thereof.

This question can only be answered by an analysis of Section 517.

In the case of *In Re Consolidation Motor Inns,* 5 Collier Bankruptcy Cases, page 301, etc. (W. D. Georgia, July 16, 1975, W. Homer Drake, Bankruptcy Judge), No. B75-296A, an incisive analysis was written, which we believe was very apt in the case at bar.

At the outset, it is manifest that Section 517 must be construed so as to give effect to the intent of Congress in adopting that Section. If the result of that intent is equal to a repeal of Chapter XII in any viable sense, as has been urged by the Bank, then so be it. But the Debtor maintains that the Bank's interpretation is erroneous.

As Judge Drake opined in *In Re Consolidated Motor Inns, supra,* at 304:

> "The language contained in Section 517 which it is necessary for this Court to interpret to resolve the issue before it is as follows:
>
> '. . . nor shall its provisions be deemed to allow *extension or impairment* of any secured obligation held by Homeowners' Loan Corporation or by any Federal Home Loan Bank or member thereof.' (Emphasis added.)
>
> The above quoted language in Section 517 follows the first part of Section 517 which reads as follows:
>
> "Nothing contained in this Chapter (XII) shall be deemed to *affect or apply* to the creditors of any debtor under a mortgage issued pursuant to the National Housing Act and Acts amendatory thereof and supplementary thereto; . . .' (Emphasis added.)
>
> "While the operative words before this Court for construction in the instant case are 'extension' or 'impairment' in the above quoted second part of Section 517, it is obviously also necessary to relate those words to the words 'affect' or 'apply' in the above quoted first part of Section 517. Considered in the abstract, this Court perceives a distinct difference between 'affect' or 'apply' and 'extension' or 'impairment'. The former words contained in the first part of Section 517, in the opinion of this Court, essentially refer to a frame of reference or to relevancy. They are extremely broad and would include any action that relates to the obligations referred to in the first part of Section 517. On the other hand, the words 'extension' or 'impairment' are more restrictive and imply some adverse effect upon the subject. . . .

> "While it is useful to consider the ordinary meanings of the words 'affect', 'apply', 'extension' and 'impairment', it must be recognized that these words are words placed by the Congress in a section of the Bankruptcy Act. As such, they clearly must be considered in a bankruptcy context and to the extent their meaning in that context is different than their ordinary meaning or meaning under some other area of the law, the meaning in the bankruptcy context must necessarily govern in this proceeding."

The Court, in the *Consolidated Motor Inns* case, *supra,* then distinguished *Monte Vista Lodge v. Guardian Life Insurance Company of America,* 384 F. 2d 126 (9th Cir. 1967). The *Monte Vista Lodge* case construes the first part of Section 517 (the same language being a part of Section 263 of Chapter X of the Bankruptcy Act), and does not deal with the second part of Section 517, which is the operative language before this Court, and which language is not contained in Chapter X and, therefore, was not before the 9th Circuit in the *Monte Vista Lodge* case.

In *In re Consolidated Motor Inns, supra,* the Court traces the legislative history of Section 517, and no useful purpose is served by repeating the language of the opinion, which can easily be read by this Court. One important aspect, however, is set forth at page 307 of 5 CBC, where Judge Drake explains:

> "Plaintiff seems to question whether an 'extension' under Chapter XII of the Bankruptcy Act would qualify as a 'plan.' This Court has no doubt whatsoever that a plan under which debts are paid in full but over a longer period of time than would otherwise be required would qualify as a 'plan' under Chapter XII of the Bankruptcy Act. This is true not only because such is the clearly recognized law under various other rehabilitative chapters of the Bankruptcy Act but also because it was clearly the intent of the Congress in establishing Chapter XII

that an extension of time for payment be one of the available courses of action to a debtor. For example, the report to the United States House of Representatives by the House Judiciary Committee on the bill to create Chapter XII includes the following language:

> 'Chapter XII permits the settlement, satisfaction, or *extension of the time of payment* of debts secured by real property or chattels real, including the right to obtain relief under the Bankruptcy Act without the necessity of submitting to an adjudication.' (Emphasis added.) House Report 1409, 75th Congress, 1st Sess. (July 29, 1937).' "

The Court points out that the word "extension" in Section 517 "meaning a plan under which debts are paid in full but over a longer period of time . . .", can only be interpreted as the quoted language indicates.

The word "impairment", however, "does not have a well-recognized meaning in a bankruptcy context."

"Impairment", thus, is defined as Black's Law Dictionary sets it forth, as follows:

> "To weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner." at p. 885.

No final plan or arrangement was approved and, in any event, there is no indication in the record from the Court below that a final determination was made on any arrangement or plan.

The Debtor, we maintain, has been unjustly removed from possession, but would not even object to having the Bank, or a Managing Agent for the Bank, manage the property, so long as a stay is granted and so long as the arrangement proceedings under Chapter XII can be carried on. This has not, however, been done.

As Judge Drake indicated in the *Consolidated Motor Inns* case (5 CBC at 308):

> "This Court is without authority to assume in the absence of evidence that a secured creditor is being adversely affected or suffering harm as a result of an order restraining him from foreclosing on security. See *Kaplan v. Anderson*, 256 F. 2d 416 (5th Cit. 1958) and *In re General Stores Corp.*, 147 F. Supp. 350 (S. Dist. N. Y. 1957). Also see *In re Atlantic Steel Products Corp.*, 31 F. Supp. 408 (E. Dist. N. Y. 1939) and *In re Bermec Corp.*, 445 F. 2d 367 (2nd Cir. 1971)."

The Court, furthermore, in *Consolidated Motor Inns, supra,* noted that the legislative history leading up to the adoption of the second part of Section 517 does not support the proposition that Section 517 requires a complete exemption of secured obligations, and the security behind those obligations, with respect to members of the Home Loan Bank.

It is a cardinal principle of statutory construction that courts should give to statutes meanings in accordance with the intent behind the passage of the statutes, and should avoid unjust or absurd results (*Sorrells v. United States,* 287 U. S. 435).

In some instances, this may even require giving certain words meanings different than their ordinary or apparent meaning (*Knapp v. McFarland,* 462 F. 2d 935 [2 Cir. 1972]; *Wirtz v. Allen, Green & Associates, Inc.,* 379 F. 2d 198 [6th Cir. 1967]).

In interpreting the Bankruptcy Act, and particularly the various rehabilitative chapters contained therein, ". . . the courts have almost universally recognized that the statute

should be liberally construed so as to accomplish said rehabilitative purposes" (5 CBC 309; 6 Collier on Bankruptcy 0.11 at p. 11).

In *In re Consolidated Motor Inns, supra,* the Court further explained why it could not view the second part of Section 517 as supporting an exclusion and exemption of persons similarly to the Bank herein; thus at 310 of 5 CBC, the Court asserted:

> "As has been discussed above, the words 'extension' or 'impairment' have a distinctly different and narrower meaning than the words 'affect' or 'apply'. In light of this difference, this Court does not believe it is reasonable to interpret the presence of the conjunction 'nor' connecting the two parts of Section 517 to require that the broad exemption arguably afforded by the first part is necessarily included in the second part. The Court could understand the Plaintiff's construction of the presence of the conjunction 'nor' if the exemption afforded by the second part was broader than the exemption afforded by the first part. However, the opposite is the case here."

See also, *In re Hall Associates,* 8 CBC 290 (E. D. Pa. 3/22/76, Emil F. Goldhaber, Bankruptcy Judge, No. 75-1286).

POINT II.

The lower Court erred in failing to grant a stay as requested. This Court should impose a stay so as to render any decision on appeal meaningful.

This Court is aware, of course, that the Courts below interpreted Section 517 as mandating a dismissal of the proceeding so far as the Bank was concerned. They refused, moreover, to even grant a stay. Perhaps the Courts below were of the opinion that it was improper to grant a stay. In the case of *In re Hall Associates, supra,* however, 8 CBC at 292, the Court aptly explained:

> "We construe the legislative intent to have been, not to broaden the effect of 'affect or apply', but to restrict the effect to 'extension or impairment.' While the petitioner contends, in essence, that any stay against foreclosure constitutes an 'extension or impairment' of its secured obligation, we do not so construe the temporary restraint which prevails in the case at bar. While a stay of *unlimited* duration might well be construed to constitute an 'extension and impairment' of the obligation due the petitioner, a temporary stay should not be so construed: *In re Jersey Island Packing Co.* (CCA9), 138 F. 625; *Continental Illinois National Bank & Trust Co. v. Chicago R. I. & Pac. Ry.,* 294 U. S. 648, 676, 681; especially since we are mindful of the fact that the debtor has proposed a plan to its creditors which must shortly be acted upon. The acceptance or rejection of that plan will have an immediate effect on the temporary stay imposed on the petitioner.
>
> "To summarize: With respect to secured obligations insured under the National Housing Act, the first portion of §517 broadly mandates that the provisions of Chapter XII shall not 'affect or apply' to such obligations. However, with respect to secured obligations held by members of the Federal Home Owners' Bank, the restriction is narrowed to proscribe any 'extension or impairment' of such obligation."

See also, *Matter of Nevada Towers Associates,* 14 CBC 146, S.D.N.Y. 8/10/77, Roy Babitt, B. J., No. 77 B 1170, where the Court also indicates that a stay is consistent with procedings under Chapter XII.

The Debtor has expressed willingness to permit the Bank, or a Managing Agent approved by the Bank, to manage the property during the pendency of a stay.

Section 428 of the Act and Rule 12-43(a) indicates that where the lack of a stay would end any possibility of the Debtor's rehabilitation and the Mortgagee would not be crucially harmed, the Court should properly grant the stay (see Collier on Bankruptcy, 14th Ed. 4A:70.39, 9:4.16).

We submit that the Bank has not demonstrated why it would be irreparably damaged by a stay, especially where it or its designee would manage the property during a stay. Without the stay, obviously, the entire purpose of the Act is frustrated.

Injunctive relief will be granted even absent a showing of probable success where there are serious questions going to the merits sufficient to litigate. See *Triewasser & Katz v. A, T & T,* 535 F. 2d 1356, 1359 (2 Cir. 1976); *Sonesta International Hotels v. Wellington Associates,* 483 F. 2d 247, 250-251 (2 Cir. 1973); *Gulf & Western Industries v. Great Atlantic & Pacific Tea Company,* 476 F. 2d 687, 692-693 (2 Cir. 1973).

POINT III.

The interpretation placed upon Section 517 of Chapter XII deprives Debtor of the equal protection of the laws and deprives him of property without due process. Debtor urges that the Federal Home Loan Bank was never intended to apply to commercial property.

The effect of the action of the Courts below, in essence, precludes the Debtor from any meaningful relief under Chapter XII. The whole purpose of that Chapter is to protect non-corporate debtors which own realty.

Virtually every bank is a member of the Federal Home Loan Bank, since presumably, by merely paying dues, one remains a member. It is submitted, however, that as *In re Consolidated Motor Inns* suggests, it is only when the United States itself has an interest in the case or property, that the provisions of Section 517 should be invoked.

The adoption of the Bank's position in this proceeding would lead to the possibiiity that the Debtor could apply for a conversion of this Chapter XII proceeding, which is designed to deal with both secured and unsecured debts, to a Chapter XI proceeding, which is not designed to deal with secured debts of any kind.

> "Surely, the Congress did not intend that Section 517 of Chapter XII be construed in a manner to create such a possibility. The same would be true in regard to Chapter XIII . . . which cannot deal with debts secured by real property. This possibility would be created because the second part of Section 517 is not present in any other rehabilitative chapter of the Bankruptcy Act" (*Consolidated Motor Inns, supra,* 5 CBC at 314).

The Bank would have the Court remove the possibility of any individual or partnership having available a rehabilitation opportunity in those instances in which secured obligations are held by Federal Savings and Loan Associations. Thus, this would violate the Equal Protection Clause of the Constitution. It would also, in essence, be depriving Debtor of the Due Process of Law because of the "Pickwickian" interpretation of the lower Court on Section 517.

We would ask this Court to seek to determine how the mere membership of the Bank in the Federal Home Loan Bank, *ipso facto,* affects this mortgage in the first place, and how it is in any way prejudiced by being made subject to the provisions of Chapter XII.

As will be shown in the next Point, the Bank waived this jurisdictional question, if it exists at all, and it was merely an afterthought to raise the question of Section 517.

It is obvious, we maintain, that the Federal Home Loan Bank, which is mentioned in the Section along with the Home Owners Loan Corporation, that the statute was meant to apply to one and two family homes, and not to commercial property at all. As the interpretation stands now, Section 517 emasculates Chapter XII altogether.

POINT IV.

The Bank, in essence, waived any jurisdictional complaints and "consented" to jurisdiction, even assuming *arguendo*, that Section 517 were applicable in the case at bar.

As we have pointed out previously, it was not until mid-1977 that the Bank sought to divest the Bankruptcy Court of jurisdiction by claiming that the provisions of Section 517 of Chapter XII mandated dismissal as against them.

The Bank, however, did not move when the petition was filed on August 25, 1976, but waited until the following year before making a motion under 517 of the Act.

Under Rule 915(a), unless a party objects to the Bankruptcy Court's jurisdiction in an adversary proceeding by motion or answer, whichever is first served, the party consents to such jurisdiction (Collier on Bankruptcy, 14th Ed., 13:915.03).

In the case of *In Re APCL & K, Inc.*, E. D. Pa., 8/31/77, 14 CBC 157 [No. 77-2483 per Emil F. Goldhaber, B. J.], the Court ruled that it was necessary, *"as a matter of law"*, that a defendant must object to the Bankruptcy Court's jurisdiction "'at the first opportunity', when it filed its original answer . . .". (*In Re APCL & K, Inc., supra,* 14 CBC at 159).

Because of the importance and aptness of this case to the instant Point and this Brief, we shall deal with the case in greater detail.

In said case, a proceeding was started by the Trustee, under Rule 701 of the Rules of Bankruptcy Procedure. On January 17, 1977, the defendant filed its answer, responding solely to the merits, and not challenging the Bankruptcy Court's jurisdiction. On February 9, 1977 (a far shorter time than that involved in the case at bar), the defendant amended its answer and, for the first time, challenged the Bankruptcy Court's jurisdiction. Judge Goldhaber, in denying the motion to dismiss, explained as follows (14 CBC at 158, 159):

> "The defendant cites three cases: *In Re Los Angeles Trust Deed and Mortgage Exchange* (CCA9), 464 F. 2d 1136 (1972); *In Re Perspectron* (CCA7), 422 F. 2d 576 (1970); and *Gill v. Phillips* (CCA5), 337 F. 2d 258 (1964), in support of its asserted right to file a moratory jurisdictional challenge. We hold the principles enunciated by these cases to be outdated and hence, inapposite.
>
> "On October 1, 1973, by order of the United States Supreme Court, new Rules of Bankruptcy Procedure became effective. Included among these rules is Rule 915(a) which succinctly provides that

'. . . a party waives objection to jurisdiction of an adversary proceeding or a contested matter and thereby consents to such jurisdiction if he does not make objections by a timely motion or answer, whichever is first served.'

"And the Advisory Committee's Note leaves no doubt as to the intent of this Rule:

'The premise of subdivision (a) is that a party to any controversy being litigated in the bankruptcy court must object to the court's jurisdiction at the first opportunity in order to avoid being deemed to have consented thereto . . .'

"*In Re Dunne* (D. C. R. I.), 407 F. Supp. 308 (1974), the adversary proceeding was for reclamation and the plaintiff did not raise the jurisdictional issue until the case was on appeal. Said the Court

'A review of the record disclosed that the plaintiff failed to raise this objection either in its answer to the counterclaim or by motion. According to Rule 915(a) Rules of Bankruptcy Procedure, failure to raise such objection to the bankruptcy court's summary jurisdiction constitutes a waiver of that objection.' "

Finally, the Court emphasized:

"It follows, then, as a matter of law, that the defendant's failure to object to this court's summary jurisdiction 'at the first opportunity,' *i. e.*, when it filed its original answer, constitutes a consent to said jurisdiction."

We submit that the foregoing very recent incisive opinion amply supports the Debtor's position that the Bank has waived any jurisdictional claims, even assuming, and certainly without conceding, that such claims are viable.

POINT V.

We believe this appeal presents a question of first impression as to whether Section 517 applies to commercial property; whether it is constitutional; whether it conflicts with the intent of Congress in enacting Chapter XII; and whether the Bank waived any possible jurisdictional claim by not asserting it promptly.

We have detailed, in the preceding Points, the substance of the Point Heading herein.

We wish to emphasize that a perusal of the very few cases that could be found interpreting and explaining the second part of Section 517 of the Act, reveals that there is apparently no constitutional analysis of its viability, particularly as applied to the case at bar.

Chapter XII was obviously designed to grant rehabilitative relief, as is set forth in the cases of *In Re Consolidated Motor Inns, supra,* and *In Re Hall Associates, supra,* in a context not offered by any of the other Chapters of the Bankruptcy Act.

Since banks are frequently involved in secured transactions involving real property, and many of those banks are no doubt dues-paying members of the Federal Home Loan Bank, it is obvious that any interpretation such as that by the Court below, which declares Chapter XII inapplicable to any bank merely because it is a member of the Federal Home Loan Bank, would essentially frustrate and emasculate the congressional intent in enacting this legislation.

In addition, persons in the position of the partnership constituting the Debtor herein, are obviously deprived of, and denied, protection of a rehabilitative nature under the Bankruptcy Act.

The Court below also reasoned that it could not even grant a temporary stay for fear that such a stay would violate the Act by constituting an allegedly prohibited "extension or impairment" of the secured obligation. We have pointed out, however, and cited cases, *supra,* indicating that this reasoning is fallacious.

We are, of course, asking this Court for both a temporary and permanent stay.

The context of the statute, moreover, refers in the second clause of Section 517, to the Home Owners' Loan Corporation, or Federal Home Loan Bank. This Court necessarily must realize that the Congressional intent could not have intended to include multi-dwelling commercial property within its purview, since otherwise the statute would give virtually no protection in any meaningful sense.

Conclusion.

The petition for certiorari should be granted and the foreclosure rescinded.

Respectfully submitted,

IRVING ANOLIK,
Attorney for Petitioner.

APPENDIX.

Memorandum by Metzner, D. J.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER
of
83RD REALTY COMPANY,

Debtor.

No. 76 B 1922

METZNER, D. J.:

The debtor appeals from an order of Bankruptcy Judge Lesser's dismissal of his petition for arrangement under Chapter XII of the Bankruptcy Act, 11 U.S.C. §§ 801-926 (1970).

The first mortgagee is the Jamaica Savings Bank, which is a member of the Federal Home Loan Bank. It held a mortgage on the multi-unit apartment complex owned by the debtor. It moved for dismissal of the debtor's petition citing the second clause of Section 517 of the Bankruptcy Act, 11 U.S.C. §917 (1970). That section provides:

> "Nothing contained in this chapter shall be deemed to affect or apply to the creditors of any debtor under a mortgage insured pursuant to the

> National Housing Act and Acts amendatory thereof and supplementary thereto; nor shall its provisions be deemed to allow extension or impairment of any secured obligation held by Home Owners' Loan Corporation or by any Federal Home Loan Bank or Member thereof."

The bankruptcy judge found that none of the various plans submitted by the debtor during the fifteen months from the date it filed its petition could be approved under Section 517, since they all extended or impaired the mortgage held by the bank. Dismissal of the petition followed, since it was found that the debtor has been given "an exorbitantly reasonable amount of time to come up with a program to save its investment in the property and had been unable to do so."

On appeal, the debtor argues that the bankruptcy judge erred in holding that Section 517 applied to the proceeding. It asserts that the section should not apply to multi-unit dwellings and that the bank should be required to show actual prejudice.

Appellant's argument that Congress could not have intended Section 517 to apply to this mortgage is premised on nothing more than appellant's view of how the Bankruptcy Act should be written. Appellant cites absolutely no evidence, factual or historical, to permit speculation that the terms of Section 517 were intended to have anything other than their manifest import. Moreover, appellant fails to demonstrate that the section "frustrates" or "emasculates" the purposes of Chapter XII beyond the fact that it disqualifies appellant's various proposals. There is absolutely no basis for reading into the limitation a restriction to one- or two-family homes, as the debtor urges, or to require a showing of prejudice.

Appellant's constitutional argument is equally conclusory and unsupported by statutory or case authority, and merits no discussion.

Finally, erroneously characterizing the issue as one of jurisdiction, appellant asserts that the bank waived any objection to the court's approval of the proffered plans by not raising Section 517 as a bar earlier in the proceeding. Clearly, a plan could not be found to extend or impair the mortgage, and therefore be deemed unapprovable under Section 517 until it was submitted to the bankruptcy court. There was no waiver by the bank.

The order is affirmed.

So ordered.

Dated: New York, N. Y.
April 14, 1978

CHARLES M. METZNER
U.S.D.J.

Order of Court of Appeals.

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirtieth day of May, one thousand nine hundred and seventy-eight.

IN THE MATTER

of

83RD REALTY COMPANY,

Debtor-Appellant,

v.

JAMAICA SAVINGS BANK,

Appellee.

78-8158

It is hereby ordered that the motion made herein by counsel for the appellee by notice of motion dated May 16, 1978 to dismiss the appeal from the United States District Court for the Southern District of New York for frivolousness be and it hereby is granted.

A. DANIEL FUSARO,
Clerk
By EDWARD I. GUARDANO
Staff Attorney

HON. HENRY J. FRIENDLY
HON. WILLIAM H. TIMBERS
Circuit Judges
HON. WALTER E. HOFFMAN
District Judge

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirtieth day of May, one thousand nine hundred and seventy-eight.

IN THE MATTER

of

83RD REALTY COMPANY,

Debtor-Appellant,

v.

JAMAICA SAVINGS BANK,

Appellee.

78-8158

It is hereby ordered that the motion made herein by counsel for the appellant by notice of motion dated May 11, 1978 for a stay be and it hereby is denied.

It is further ordered that the motion for leave to docket the appeal be and it hereby is granted.

A. DANIEL FUSARO,
Clerk
By EDWARD I. GUARDANO
Staff Attorney

HON. HENRY J. FRIENDLY
HON. WILLIAM H. TIMBERS
Circuit Judges
HON. WALTER E. HOFFMAN
District Judge

Supreme Court, U. S.
FILED
OCT 16 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No.

In The Matter of 78-332

83RD REALTY COMPANY,
Debtor-Petitioner,

vs.

JAMAICA SAVINGS BANK,
Respondent.

ANSWERING BRIEF SUBMITTED BY JAMAICA SAVINGS BANK, RESPONDENT, IN OPPOSITION TO DEBTOR-PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

SALOMON A. HAUPTMAN
Attorney for Respondent
32 Court Street
Brooklyn, N.Y. 11201
(212) 875-8997

DICK BAILEY PRINTERS, 290 RICHMOND AVE., S.I., N.Y. 10302
TEL.: (212) 447-5358

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In The
SUPREME COURT OF THE UNITED STATES
October 1978 Term

In the Matter
of
83RD REALTY COMPANY,
Debtor-Petitioner,

vs.

JAMAICA SAVINGS BANK,
Respondent.

ANSWERING BRIEF SUBMITTED BY JAMAICA SAVINGS BANK RESPONDENT, IN OPPOSITION TO DEBTOR-PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Statement

JAMAICA SAVINGS BANK (Bank) submits this brief in opposition to the petition of the Debtor, 83rd REALTY COMPANY, for a writ of certiorari to review the determination of the United States Court of Appeals for the Second Circuit, and the United States District Court for the Southern District of New York, both of which courts affirmed an order of the Bankruptcy Court for the Southern District of New York dismissing the Debtor's petition under Chapter XII of the Bankruptcy Act, on the ground that the Debtor's prayer for relief in its

Chapter XII proceeding would contravene the provisions of Sec. 517 of the Bankruptcy Act, (11 USC, Sec. 917).

Relevant portions of the opinion of the Bankruptcy Judge dismissing the proceeding are found on page 4 of the Debtor's brief.

On the Debtor's appeal from the order of dismissal by the Bankruptcy Court, the District Court for the Southern District of New York, (Metzner, D.J.), wrote an opinion sustaining the Bankruptcy Court. That opinion is found on pp. 23 to 25 of the Debtor's brief.

On the Debtor's appeal from the order of the District Court, the order of the Court of Appeals granting Respondent's cross motion in that court to dismiss the appeal for frivolousness, is set forth on page 26 of the Debtor's brief.

The order of said Court of Appeals denying the Debtor's motion for a stay of the Bank's foreclosure action is found on page 27 of the Debtor's brief.

Questions Presented

1. In light of the findings of the Bankruptcy Judge resulting in a dismissal of the Debtor's petition under Chapter XII; in light of the District Court's affirming the order of dismissal; and in light of the order of the Court of Appeals denying a stay of the pending foreclosure and dismissing the appeal for frivolousness and sustaining the two lower courts, may the Debtor bring on this petition for a writ of certiorari?

2. Is Sec. 517 of the Bankruptcy Act, which prohibits the Bankruptcy Court from confirming any plan which extends or impairs any secured obligation held by a member of the Federal Home Loan Bank, constitutional?

3. In view of the statement found on page 5 of the Debtor's brief that the second mortgagee, CURZON & CO., has succeeded in foreclosing upon the Debtor's subject property, is the Debtor's proceeding rendered moot and academic?

4. Is there merit to the Debtor's contention that the Bank's failure promptly to move for a dismissal of the Chapter XII proceeding as being in contravention of Sec. 517 of the Bankruptcy, amounted to the granting of jurisdiction "on consent" upon the Bankruptcy Court?

Background of the Proceeding

The Bank is a member of the Federal Home Loan Bank of New York. It is the holder of a first mortgage on the Debtor's improved real property consisting of a complex of five buildings comprising 180 apartments situated at 8331—116th Street, Kew Gardens, Queens, New York, (the premises).

The premises were constructed in about 1950 under FHA Sec. 608, in order to meet the post-war demand for moderately priced rental housing constructed with FHA-insured mortgage financing.

In January 1974, the Debtor purchased these premises from its previous owner, (CURZON CO.), the second mortgagee, (a party to this proceeding), for an indicated purchase price of $2,250,000; the Debtor took title thereto subject to an existing first mortgage of about $1,600,000 held by the Bank, gave the seller, CURZON CO., a second purchase-money mortgage of about $340,000, and paid the difference in selling price of about $240,000, in cash.

The record taken in the Bankruptcy Court indicates, without substantial dispute, that since the Debtor acquired title in 1974, the physical plant of these premises, namely, the structure and all its appurtenances, have been progressively deteriorating because of the Debtor's failure to make necessary repairs.

By the same token, and correlatively, the premises have shown an operating deficit, under the Debtor's management, because of an inordinate vacancy rate of between 20 and 26 apartments out of a total of 180 apartments; in terms of annual rents lost by virtue of this heavy

vacancy rate, this vacancy experience amounts to a loss of between $60,000 to $75,000 in cash income annually.

During the approximately fifteen months between the Debtor's filing of its Chapter XII petition and the order of November 23, 1977 dismissing the Chapter XII proceeding, the Debtor experienced an operating loss, before providing for debt service, of about $82,000. This operating deficit is augmented by the unpaid debt service during that period of approximately $176,000, making an aggregate operating deficit for that period, inclusive of unpaid debt service, of about $258,000.

The Bank's expert testified before the Bankruptcy Court that by virtue of the deteriorated physical condition of the premises, with the resultant high vacancy rate, the fair value of the premises was $1,600.00.

The Debtor submitted a written appraisal to the Bankruptcy Court indicating a current fair value of the premises of only $1,000,000.

It is against this factual background that the Debtor first submitted its plan of arrangement on February 24, 1977—some six months after it filed its petition for an arrangement.

Thereafter, the Debtor filed various amendments to that plan, the most recent of which was dated July 28, 1977.

With respect to the Bank's mortgage, the Debtor's plan, as amended, gave the Bank a choice of two options:

Under Option A, the Bank's mortgage of $1,600,000, including substantial arrearage and interest, was to be reduced to $1,000,000, with a maturity date fixed at ten years from the date of confirmation.

Under Option B, the Bank's mortgage was to be reduced to the sum of $750,000, with a maturity date ten years from the date of confirmation, with the added provision that the Debtor, which until then was not personally

obligated under the underlying bond and mortgage, would personally assume payment of the bond and mortgage.

The Bank formally rejected said plan of arrangement, as well as the later amendments thereto made by the Debtor.

During the pendency of the Chapter XII proceeding, and in early August 1977, (some six weeks after the Debtor's most recent amendment to its plan of arrangement), the Bank became aware that it was a member of the Federal Home Loan Bank of New York, and had been such a member continuously since 1965 and up to the present.

On the basis of the fact of the Bank's membership in the Federal Home Loan Bank, the Bank moved for an order dismissing the Debtor's Chapter XII petition and proceeding under Sec. 517 of the Bankruptcy Act.

Sec. 517 of the Act provides, as follows:

> "*** nor shall its provisions be deemed to allow extension or impairment of any secured obligation held by *** any Federal Home Loan Bank or member thereof."

The Debtor has never contested the statement in the Bank's moving papers that the Bank, indeed, was a member of the Federal Home Loan Bank of New York during the relevant periods affecting the underlying mortgage.

The Bankruptcy Judge, by his order dated November 23, 1977, made the following findings of fact and directions:

> "1. JAMAICA SAVINGS BANK, first mortgagee herein, has been, at all times relevant to this proceeding, and now is, a member of the FEDERAL HOME LOAN BANK OF NEW YORK.
>
> 2. JAMAICA SAVINGS BANK comes within the provisions of Sec. 517 of the Act and particularly that portion thereof which provides as follows:— 'Nothing contained

in this chapter *** shall *** be deemed to allow extension or impairment of any secured obligation held by *** any FEDERAL HOME LOAN BANK or member thereof.'

3. The various plans and amendments thereto or amended plans filed by both the Debtor and CURZON COMPANY, the secured mortgagee, impair the secured obligation held by JAMAICA SAVINGS BANK on the Debtor's real property; hence, none of the plans or amended plans or amendments to plans filed by the Debtor or CURZON COMPANY may be confirmed.

4. JAMAICA SAVINGS BANK has rejected all the plans or amended plans or amendments to plans filed by both the Debtor and CURZON COMPANY.

5. Accordingly, the petition for arrangement filed by the Debtor under Sec. 422 of the Act, be, and the same hereby is, dismissed, subject to the further provisions of this order set forth hereinbelow, reserving and retaining to this court continued jurisdiction of this proceeding with respect to the matters hereinbelow set forth."

The Bankruptcy Judge's order of dismissal further provided that the automatic stay provided in Rule XII-43 of the Rules of Bankruptcy Procedure, and the restraining order earlier issued by said Bankruptcy Court, dated August 25, 1976, which had restrained the Bank from continuing its pre-Chapter XII foreclosure action instituted by the Bank in the New York Supreme Court, Queens County, to foreclose the subject first mortgage, be vacated and the Bank be authorized to continue with its state foreclosure action against the Debtor.

Accordingly, and on the granting of said order of dismissal, the Bank reactivated its State Court foreclosure action; the Receiver of rents of said premises, earlier appointed by the State Court, assumed management of the property.

A motion made by the Debtor before the Bankruptcy Judge for a stay of the order of dismissal pending a proposed appeal to the District Court was denied by the Bankruptcy Judge.

At the hearing in the Bankruptcy Court on the Debtor's motion for a stay, the court stated, inter alia, as follows:

"In so far as it applies to the stay, the probability is that I would have refused to confirm making the plan on its merits if the Sec. 517 had not been put into sharp focus before hand.

I am not saying that is in any way binding upon the Debtor but it certainly is part of my reasoning and mental processes in refusing to grant the stay.

As far as I was concerned, on one ground or another, this case was over in the Chapter XII court. The Debtor had been given an exorbitantly reasonable amount of time to come up with a program to save its investment in the property and had been unable to do so.

Accordingly, I felt that the time had come to end the proceeding and permit the state remedies to take their course. That being so, I will enter a memorandum endorsement upon the application for stay, which, in effect, recites for the reasons recited before the record before me the application for stay made by the Debtor by OSC, dated December 1, 1977, which was made returnable today, will be denied."

The Debtor then proceeded with its appeal to the District Court for the order of dismissal and moved for a stay pending the determination of the appeal.

The District Court, (Metzner, D.J.), affirmed the order of dismissal and denied the stay. That opinion is set forth on page 23 of the appendix to the Debtor's brief.

In relevant part, the District Judge's opinion states:

"The bankruptcy judge found that none of the various plans submitted by the debtor during the fifteen months from the date it filed its petition could be approved under Section 517, since they all extended or impaired the mor-

tgage held by the bank. Dismissal of the petition followed, since it was found that the debtor has been given 'an exorbitantly reasonable amount of time to come up with a program to save its investment in the property and had been unable to do so.'

On appeal, the debtor argues that the bankruptcy judge erred in holding that Section 517 applied to the proceeding. It asserts that the section should not apply to multi-unit dwellings and that the bank should be required to show actual prejudice.

Appellant's argument that Congress could not have intended Section 517 to apply to this mortgage is premised on nothing more than appellant's view of how the Bankruptcy Act should be written. Appellant cites absolutely no evidence, factual or historical, to permit speculation that the terms of Section 517 were intended to have anything other than their manifest import. Moreover, appellant fails to demonstrate that the section "frustrates" or "emasculates" the purposes of Chapter XII beyond the fact that it disqualifies appellant's various proposals. There is absolutely no basis for reading into the limitation a restriction to one- or two-family homes, as the debtor urges, or to require a showing of prejudice.

Appellant's constitutional argument is equally conclusory and unsupported by statutory or case authority, and merits no discussion.

Finally, erroneously characterizing the issue as one of jurisdiction, appellant asserts that the bank waived any objection to the court's approval of the proffered plans by not raising Section 517 as a bar earlier in the proceeding. Clearly, a plan could not be found to extend or impair the mortgage, and therefore be deemed unapprovable under Section 517 until it was submitted to the bankruptcy court. There wsa no waiver by the bank.

The order is affirmed."

The Debtor then appealed to the Court of Appeals for the Second Circuit and brought on a motion for a stay of

the order of dismissal and of the vacatur of the automatic stay against continuing the State Court foreclosure action.

The Bank thereupon served its cross notice of motion in the Court of Appeals asking for an order dismissing the appeal on the ground that the appeal was frivolous and without merit.

The Court of Appeals at the close of the argument of the appeal and of the various motions denied the Debtor's motion for a stay and granted the Bank's motion to dismiss the appeal for frivolousness.

The Debtor then applied to this court for a stay of the bankruptcy proceedings and of the State Court foreclosure action pending the outcome of the Debtor's filing a petition with this court for a writ of certiorari to the Court of Appeals.

The Debtor's application to this court for such a stay was denied by Mr. Justice Marshall on July 10, 1978.

It is against this legal and factual background that the respondent Bank submits this brief in opposition to the Debtor's petition for a writ of certiorari.

POINT I

IN LIGHT OF THE FINDINGS OF THE BANKRUPTCY JUDGE RESULTING IN A DISMISSAL OF THE DEBTOR'S PETITION UNDER CHAPTER XII; IN LIGHT OF THE DISTRICT COURT'S AFFIRMING THE ORDER OF DISMISSAL; AND IN LIGHT OF THE ORDER OF THE COURT OF APPEALS DENYING A STAY OF THE PENDING FORECLOSURE AND DISMISSING THE APPEAL FOR FRIVOLOUSNESS AND SUSTAINING THE TWO LOWER COURTS, THE DEBTOR'S PETITION FOR A WRIT OF CERTIORARI LACKS MERIT AND IS FRIVOLOUS

Section 517 of the Bankruptcy Act provides as follows:

> "Nothing contained in this chapter shall *** be deemed to allow extension or impairment of any secured obligation held by *** any Federal Home Loan Bank or member thereof."

Three successive courts, namely, the Bankruptcy Court, the District Court and the Court of Appeals, have held that Sec. 517 prohibits the Bankruptcy Court from confirming any plan which extends or impairs any secured obligation held by a member of the Federal Home Loan Bank.

In fact, the Court of Appeals granted the Bank's motion to dismiss the Debtor's appeal for frivolousness. All the contentions now being raised in this court by the Debtor were raised in the lower courts and were rejected by all the lower courts.

The Debtor's brief in this court states nothing that was not already included by the Debtor in the proceedings,

pleadings and arguments in the three lower courts.

The Bank respectfully submits that the Debtor's petition for a writ should be denied for frivolousness.

POINT II

SEC. 517 OF THE BANKRUPTCY ACT PROHIBITING THE BANKRUPTCY COURT FROM CONFIRMING ANY PLAN WHICH EXTENDS OR IMPAIRS ANY SECURED OBLIGATION HELD BY A MEMBER OF THE FEDERAL HOME LOAN BANK IS CONSTITUTIONAL.

The Debtor does not contest that, at all times relevant to this proceeding, the Bank has been a member of the Federal Home Loan Bank of New York; that fact was found by the order of the Bankruptcy Court, dated November 23, 1977, (supra).

Congress, in enacting Sec. 517, intended to accomplish what that section clearly provides, namely, that no plan may be confirmed, the effect and scope of which will be to extend or impair the Bank's mortgage on the Debtor's real property.

The Debtor's plan, as finally amended, clearly calls for an extension of the Bank's mortgage for ten years beyond the confirmation date despite the fact that the Bank's mortgage, by its terms, matures in 1982.

Moreover, it is beyond cavil that the Debtor's amended plan envisages the impairment of the Bank's mortgage by reducing it, under Option A, to $1,000,000 "flat" from $1,600,000, plus accrued interest, and under Option B, calls for a further reduction of the Bank's mortgage to $750,000, this time backed up by the personal guarantee of the Debtor.

It readily appears, therefore, that the Debtor's plan contravenes the prohibition against (a) extension, or (b)

impairment of the Bank's mortgage as spelled out in Sec. 517.

Statutes should be read as they are written. Sec. 517 requires no interpretation—it means just what it says.

A reference to the circumstances under which Sec. 517 was enacted, sustains the Bank's position and the constitutionality of the section.

Sec. 517 was enacted to encourage post-World War II construction of moderately priced rental housing. The financing of such construction was to be accomplished by bank loans. Congress felt that banks would hesitate to lend mortgage money for this type of construction if, under Chapter XII of the Act, the bank's mortgage could be extended or impaired at the instance of mortgagors (debtors) against the banks' wishes; hence, to induce banks to make mortgage loans on the subject type of housing, and to secure the banks against undesired extensions or impairments of their mortgage loans, Congress enacted Sec. 517. The fact is that the subject housing complex was built and financed under what is known as a Sec. 608 Federal Housing Administration Plan—an FHA construction. It was just for this type of construction and financing that Sec. 517 was enacted.

Congress may legislate in this area in a fair and rational manner; it may set up classifications of lending institutions whose securities may not be extended or impaired; this power and authority is within the ambit of the Congressional legislative right.

A comprehensive discussion of Sec. 517 is found in CONSOLIDATED MOTOR INNS, 5 Collier Bankruptcy Cases 301, (W.D. Georgia 1975).

In that case, CLEARWATER FEDERAL SAVINGS & LOAN ASSOCIATION, (the bank), a member of the Federal Home Loan Bank, and the holder of a mortgage on two motels, sought relief from the automatic stay provided by Rule XII-43 of the Rules of Bankruptcy Pro-

cedure, immediately after the filing by the Debtor of the Chapter XII petition.

The Bankruptcy Court first noted that the debtor had an equity in the property, and hence, there was no problem as to the deterioration of the bank's security while the Chapter XII proceeding was pending. This, in turn, brought up the question of whether the debtor planned to have its mortgage "extended" under its proposed plan.

The court there stated:

> "The plaintiff (bank) has not shown an 'extension' of its secured obligation because a plan of arrangement ***has not been filed*** by the defendant (debtor) and it is still possible that the defendant will pay all the obligations within the time permitted by the instruments creating them. This could not constitute an 'extension' and therefore would not be in violation of the second part of Sec. 517."

That court, after tracing the legislative history of "extension," as used in Chapter XII, stated:

> "Since the word extension has a well recognized meaning under the various rehabilitative chapters of the Bankruptcy Act and was clearly envisioned, at the time Chapter XII was created, as a possible type of plan under that chapter, this court has no alternative but to construe the word 'extension' in the second part of Sec. 517 as meaning a plan under which debts are paid in full but over a longer period of time than would otherwise be required."

In the case at bar, the Debtor has consistently contended that the current value of the Bank's collateral is less than the balance due on the Bank's secured obligation, namely, that the fair value of the premises is $1,000,000 as against a balance of $1,600,000, plus substantial accrued interest due on the Bank's secured obligation.

From the foregoing, it readily appears, in the case at bar, that the Debtor has no equity in the real property which can be preserved through the medium of this Chapter XII proceeding. Again, as stated above, the

amended plan filed by the Debtor clearly envisages an extension of the mortgage for ten years beyond confirmation date as against the present maturity date of June 1, 1982, as provided in the Bank's mortgage.

On either count, namely, impairment of the Bank's mortgage, or extension of the Bank's mortgage, the plan violates the prohibition contained in Sec. 517.

A related case is HALL ASSOCIATES, 8 Collier Bankruptcy Cases, 290 (W.D. Pennsylvania 1976). There, the mortgagee, a member of the Federal Home Loan Bank, sought relief from the automatic stay provided by Rule XII-43 of the Rules of Bankruptcy Procedure. The bank there contended that the automatic stay was an ipso facto extension of its mortgage, and hence, violated Sec. 517.

There, the court, after finding that the debtor had an equity in the real property, (a situation not present in the case at bar), delayed dismissal of the Chapter XII proceeding pending a hearing as to the terms of the plan to be submitted. The court there stated:

> "We turn therefore to the issue of whether the prolongation of the temporary stay will impair the petitioner's collateral. We think it would not. As of January 1, 1976, the amount due the petitioner was $3,281,594.90 and we accept the testimony of the Debtor's real estate expert that the fair market value of the petitioner's collateral is $3,550,000. Accordingly, we envision no financial harm to the petitioner during the reasonable interval during which creditors may indicate their approval or rejection of that plan."

Moreover, in the case at bar, it is undenied that during the fifteen months between the Debtor's filing of its petition for arrangement and dismissal of its petition, the premises were operating at a loss of some $82,000 before debt service and that debt service amounted to an additional $176,000, making an aggregate deficit in operations of $258,000.

In addition, it is undenied that since the Debtor acquired ownership of the subject property in 1974, and up to the present, it has consistently allowed the premises to spiral downwards into a state of disrepair; that the premises are suffering from an inordinately high rate of vacancies directly attributable to the Debtor's mismanagement and failure to maintain the premises in good repair.

In light of the fact that the Debtor has no equity in the premises and that the premises are operating and have been operating under repeated and mounting deficits and that the premises are in a state of disrepair and require substantial sums to make necessary repairs as well as to upgrade and modernize the apartments and their installations so as to reduce the high rate of vacancies, the Bankruptcy Court was justified in dismissing the proceeding.

In the matter of WINTROP ASSOCIATES (D.C. Maryland, Docket No. 76-1437-K, Bankruptcy Judge Kayser), the mortgagee sought the protection of Sec. 517 on the ground that it was a member of the Federal Home Loan Bank.

In that case, the mortgage became due prior to the Debtor's filing of its Chapter XII petition. The mortgagee moved to dismiss the proceeding on the ground that the Debtor had no equity in the property and additionally, because of the impact of Sec. 517 with respect to a mortgagee which is a member of the Federal Loan Bank.

In finding in favor of the mortgagee, the court stated:

> "The indefinite continuation of this stay against Vermont's enforcement of its lien against the subject property, would constitute an extension, impairment of the secured obligation held by Vermont.
>
> The indefinite continuation of this stay against Vermont's

enforcement of its lien against the subject property is unwarranted and unjustified since the fair market value of Vermont's collateral is less than the aggregate amount of the filed liens and encumbrances against the subject property."

In the foregoing case, the court, however, granted the debtor an opportunity to submit, within thirty days, a proposed plan for the payment of the entire secured debt. It later transpired that the Debtor was unable to raise the necessary funds to pay the mortgage in full and the proceeding was dismissed.

In summary, the Bank submits that Sec. 517 is constitutional; it is premised upon sound legislative criteria; it sets up a classification of secured creditors, namely, mortgagees which are declared to be beyond the power of the Bankruptcy Court to extend or impair their secured obligations if such mortgagee be a member of the Federal Home Loan Bank; that the Debtor's amended plan did indeed seek to extend and impair the Bank's secured obligation at a time when the Bank was a member of the Federal Home Loan Bank; hence, as the Bankruptcy Judge found the various plans and amendments thereto filed by the Debtor tended to extend or impair the obligations held by the Bank that none of the plans so filed may be confirmed, and that accordingly, the proceeding was dismissed.

POINT III

IN VIEW OF THE STATEMENT FOUND ON PAGE 5 OF THE DEBTOR'S BRIEF THAT THE SECOND MORTGAGEE, CURZON & CO., HAS SUCCEEDED IN FORECLOSING UPON THE DEBTOR'S SUBJECT PROPERTY THE DEBTOR'S CHAPTER XII PROCEEDING IS THEREBY RENDERED ACADEMIC AND MOOT.

On page 5 of the Debtor's brief, the Debtor states: "Since the proceedings below, the second mortgagee, CURZON & COMPANY, has succeeded in foreclosing upon the property."

It is respectfully submitted that in light of this fact, namely, the completion of the foreclosure action brought by the holder of the second mortgage on the Debtor's real property, the Debtor's Chapter XII proceeding is thereby rendered academic and moot. The Debtor no longer owns the subject real property; it was sold in the course of the completion of the second mortgagee's foreclosure action.

POINT IV

THERE IS NO MERIT TO THE DEBTOR'S CONTENTION THAT THE BANK'S FAILURE PROMPTLY TO MOVE FOR A DISMISSAL OF THE CHAPTER XII PROCEEDING AS BEING IN CONTRAVENTION OF SEC. 517 OF THE BANKRUPTCY ACT, AMOUNTED TO THE GRANTING OF JURISDICTION "ON CONSENT" UPON THE BANKRUPTCY COURT.

The Debtor's original plan is dated February 24, 1977—filed some six months after it filed its original petition for an arrangement.

Thereafter, the Debtor filed various amendments to its original plan by amended plans dated June 29, 1977 and July 28, 1977.

It was not until August 1977 that the Bank, and its attorneys in this proceeding, became aware of the fact that the Bank was indeed a member of the Federal Home Loan Bank of New York whereupon the Bank promptly moved, by petition and notice of motion, dated August 8, 1977, for a dismissal of the Chapter XII proceedings as being in contravention of the provisions of Sec. 517.

The Bank could not determine whether the Debtor's plan contravened the provisions of Sec. 517 until the Debtor filed its plan. It was not until six months after the arrangement proceeding was filed, namely, on February 24, 1977, that the Debtor filed its original plan.

Moreover, the original plan of February 1977 was amended from time to time, the most recent amendment being dated July 28, 1977. It was shortly after the Debtor filed its third amendment to its original plan, namely, July 28, 1977, that the Bank moved for a dismissal of the proceeding under Sec. 517.

When this point was raised during the appeal to the District Court, the court correctly noted that jurisdiction cannot be conferred upon the Bankruptcy Court by acts of the parties when indeed there was no foundation for such jurisdiction, and that if the Debtor's plan contravened Sec. 517, the court could not entertain the Debtor's plan if it tended to extend or impair the Bank's obligation.

In any event, the Debtor has failed to show that it was prejudiced in the slightest degree by the Bank's not making its motion under Sec. 517 until early August 1977.

A. The Debtor, in Point I, page 7, of its brief, makes the unsubstantiated statement, which the Respondent rejects, that:

> "If interpreted to a dryly logical extreme, it is obvious that Chapter XII would be substantially frustrated since virtually any bank involved in extending credit in connection with a real estate transaction would be a dues-paying member of the Federal Home Loan Bank."

Again, under Point III, at page 16, the Debtor erroneously states that:

> "Virtually every bank is a member of the Federal Home Loan Bank, since presumably, by merely paying dues, one remains a member."

These statements which imply that all banks are members of the Federal Home Loan Bank are not factually true and are not part of the record. It is fair to assume that many banks which prefer not to pay the substantial dues which are coupled with membership in the Federal Loan Bank, would prefer not to be members of the Federal Home Loan Bank.

B. Under Point II, at page 16, the Debtor states:

> "We submit that the Bank has not demonstratd why it would be irreparably damaged by a stay ***."

Contrary to the Debtor's assertion, the record clearly shows that the subject real property during the pendency of the Chapter XII proceeding has been operating under a substantial deficit; that net rent income, after paying maintenance and operating charges, taxes, etc. is insufficient to pay any part of the debt service due to the Bank.

C. The Debtor erroneously contends, under Point III, that "The Federal Home Loan Bank was never intended to apply to commercial property."

The Debtor further states, on page 17 of its brief:

> "The Bank would have the Court remove the possibility of any individual or partnership having available a rehabilitation opportunity in those instances in which secured obligations are held by Federal Savings and Loan Associations."

Both these statements made by the Debtor in Point III are incorrect. Congress has classified secured creditors (mortgagees) into two classes; one class comprises banks which are members of the Federal Home Loan Bank, and the second class comprises banks which are not members of the Federal Home Loan Bank.

Under the first classification, namely, membership in the Federal Home Loan Bank, all of whose members pay dues for mutual preservation based upon the dollar amount of loans made by them under the umbrella of the Federal Home Loan Bank, Congress sought to encourage bank members of the Federal Home Loan Bank to finance the construction of FHA 608 dwellings and to induce such financing, Congress, under Sec. 517 of the Act, exempted such bank members of the Federal Home Loan Bank from

extension or impairment of their secured mortgages. This classification is properly within the purview of the legitimate legislative power of Congress.

D. Under Point IV of its brief, the Debtor contends that the Bank "consented" to the Bankruptcy Court's jurisdiction. The issue is not whether the Bank consented to jurisdiction; the issue is may the court confirm a plan which contravenes the provisions of Sec. 517 as it may affect a mortgagee who is a member of the Federal Home Loan Bank.

This is not merely a matter of jurisdiction in its strict sense; this is a matter of whether the Bankruptcy Court has power in this proceeding to confirm a plan which extends or impairs the mortgage held by the Bank at a time when the Bank is a member of the Federal Home Loan Bank.

All the courts below have held that Sec. 517 prohibits a Bankruptcy Court from confirming such a plan affecting a member of a Federal Home Loan Bank.

CONCLUSION

Sec. 517 is constitutional; it prohibits a Bankruptcy Court from confirming a plan of arrangement which would extend or impair an obligation held by a bank which is a member of the Federal Home Loan Bank; the Debtor's proposed plan, as amended, does extend and impair the secured obligation held by the Respondent Bank; hence, the petition for a writ of certiorari should be denied.

Respectfully submitted,

SALOMON A. HAUPTMAN
Attorneys for Respondent
Jamaica Savings Bank
32 Court Street
Brooklyn, N.Y. 11201